Filed 3/29/19 P. v. Martinho CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. GERALD FREDERICK MARTINHO, Defendant and Appellant.	F075389 (Super. Ct. No. VCF216562) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Tulare County. Kathryn T. Montejano, Judge.

Rachel Varnell, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Chung Mi Choi, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

[*] Before Poochigian, Acting P.J., Franson, J. and Smith, J.

On December 4, 2012, appellant Gerald Frederick Martinho pled no contest, pursuant to a plea agreement, to assault with a deadly weapon other than a firearm in violation of Penal Code section 245, subdivision (a)(1),[1] a great bodily injury enhancement pursuant to section 12022.7, subdivision (a), a prior serious felony enhancement pursuant to section 667, subdivision (a)(1), and five prior prison sentence enhancements pursuant to section 667.5, subdivision (b). On March 25, 2013, appellant was sentenced to four years for the section 245, subdivision (a)(1) violation, three years for the section 12022.7, subdivision (a) enhancement, five years for the section 667, subdivision (a)(1) enhancement, and five years total for the five section 667.5, subdivision (b) enhancements, for a total sentence of 17 years.

The sentencing court suspended appellant's sentence for five years as a term of probation and committed appellant to the Tulare County jail for 365 days. The court ordered appellant to be on GPS monitoring stating, "you'll have to basically stay at home unless you're going out for any kind of treatment or appointments with [p]robation, or anything dealing with your Social Security benefits. But you must remain at your residence until such time as the [c]ourt determines that you may be released from the GPS monitoring." The court further required appellant to follow all medication and counseling and to return every two weeks so the court could monitor appellant's progress. The court also awarded appellant 1,917 days credit. Appellant did not challenge the sentence on appeal.

On January 9, 2014, the probation department filed a certificate and affidavit alleging appellant failed to comply with his GPS monitoring program. On January 31, 2014, appellant was returned to probation, and ordered to continue to comply with GPS monitoring.

---

1 Further unspecified references to code shall be to the Penal Code.

On January 25, 2016, the probation department filed a certificate and affidavit alleging appellant failed to abstain from drug use, failed to comply with mental health treatment, and failed to appear at court as ordered. On February 25, 2016, appellant was returned to probation and released to his sister-in-law, and probation was extended by five years.

On August 5, 2016, a bench warrant was issued revoking appellant's probation. The accompanying certificate and affidavit of the probation officer alleged appellant violated his probation on August 4, 2016, when he removed his ankle monitor and absconded from his residence. On March 16, 2017, appellant's probation was revoked and he was sentenced to his previously suspended sentence of 17 years. Appellant was given a total of 3,529 days credit—1,659 days actual time plus 1,870 days conduct credit.

Following a timely appeal, appellant argues he is entitled to custody credit for the time he spent on probation ordered GPS ankle monitoring.[2] As GPS monitoring is not equivalent to home detention and does not amount to custody, we affirm.

DISCUSSION[3]

Appellant contends he was under home detention, and in custody for purposes of section 2900.5, when he was placed on GPS monitoring as a condition of his probation, and therefore is entitled to presentence custody credit for that period.

"The issue involves application of a statute to undisputed facts and is subject to our independent review." (*People v. Anaya* (2007) 158 Cal.App.4th 608, 611.)

---

2 Appellant submitted supplemental briefing on the applicability of Senate Bill No. 1393 (2017-2018 Reg. Sess.) but conceded *In re Estrada* (1965) 63 Cal.2d 740 does not apply as his conviction was final in 2013. As appellant has conceded Senate Bill No. 1393 does not retroactively apply to his conviction, we omit discussion on the issue.

3 We omit the traditional statement of facts since the facts are not necessary to a resolution of the issue raised on appeal.

Section 2900.5, subdivision (a) requires the court to award time credits "[i]n all felony and misdemeanor convictions, either by plea or by verdict … all days of custody of the defendant, including days served as a condition of probation in compliance with a court order, credited to the period of confinement pursuant to Section 4019, and days served in home detention pursuant to Section 1203.016 or 1203.018 …."[4]

Section 1203.016, subdivision (a) states, "Notwithstanding any other law, the board of supervisors of any county may authorize the correctional administrator, as defined in subdivision (h), to offer a program under which inmates committed to a county jail or other county correctional facility or granted probation, or inmates participating in a work furlough program, may voluntarily participate or involuntarily be placed in a home detention program during their sentence in lieu of confinement in a county jail or other county correctional facility or program under the auspices of the probation officer."

Section 1203.016, subdivision (b) requires inmates, as a condition of participation in the home detention program, to "give his or her consent in writing to participate in the home detention program and shall in writing agree to comply or, for involuntary participation, the inmate shall be informed in writing that he or she shall comply, with the rules and regulations of the program …."

Primarily, "[t]hat in referring to 'home detention programs' in A.B. 688, the Legislature meant only electronic home detention programs established under section 1203.016, in which the prisoner is permitted to be at his or her home but must wear an electronic tracking device at all times, and submit to other statutory restrictions, is clear from the text of the bill and other legislative materials …." (*People v. Lapaille* (1993) 15 Cal.App.4th 1159, 1165.)

---

[4] Section 1203.018 applies only to inmates being held in lieu of bail, and need not be discussed in this case.

In this case, GPS monitoring was a condition of appellant's probation. The sentencing judge did not use the term "home detention" when describing the terms of appellant's probation. Nothing in the record shows appellant agreed to a home detention program pursuant to section 1203.016, signed any agreement or was informed in writing he was involuntarily committed to a program pursuant to section 1203.016. Section 2900.5, subdivision (f) is clear–home detention is specifically defined pursuant to section 1203.016. Appellant's probation does not qualify as home detention simply for sharing similar restrictions as those imposed in home detention.

Further, the court in *People v. Reinerston* (1986) 178 Cal.App.3d 320 (*Reinerston*) found electronic monitoring did not constitute custody for purposes of section 2900.5. The court stated, "While no hard and fast rule can be derived from the cases, the concept of custody generally connotes a facility rather than a home. It includes some aspect of regulation of behavior. It also includes supervision in a structured life style. None of these aspects of custody applied to defendant. He was simply required to be at home when not at work, school or counseling, or excused by the probation officer. There were no restrictions on visitation, no program to follow, and there was no one required to supervise him closely. Under these circumstances we cannot conclude that the home detention condition constituted custody which would entitle defendant to credit against his prison term." (*Reinerston*, *supra*, at p. 327.)

This case is similar to *Reinerston*. Appellant was simply required to be at home when not going out for treatment, appointments with probation, or dealing with Social Security benefits. There were no programs to follow or restrictions on visitation. While appellant was required to take his medication, attend counseling, and appear in court every two weeks, there was no requirement appellant be closely supervised. The court even retained discretion to terminate the GPS monitoring prior to the end of his probationary period.

Appellant's GPS monitoring did not constitute home detention or custody as described in section 2900.5. The superior court's denial of custody credits for the time appellant was on GPS monitoring was proper.

DISPOSITION

The judgment is affirmed.